87-1589

No._____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Date: March 24, 1988

QUESTION PRESENTED

Are federal district courts deprived of jurisdiction by Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, to enjoin strikes by railroad unions designed to block railroad transactions approved by the Interstate Commerce Commission, where the unions participated in the administrative proceedings approving the transaction.

RULE 28.1 LIST

Pursuant to Supreme Court Rule 28.1, Petitioner, The Pittsburgh & Lake Erie Railroad Company, lists the following entities as related parents, subsidiaries, affiliates, or companies in which it holds an interest:

PLECO, INC.
The Montour Railroad Company
The Youngstown & Southern Railroad Company
The Pittsburgh, Chartiers and Youghiogheny Railroad Company
The Monongahela Railway Company

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, The Pittsburgh & Lake Erie Railroad Company, and the Respondent, Railway Labor Executives' Association.

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RAILWAY LABOR EXECUTIVES' ASSOCIATION,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Pittsburgh & Lake Erie Railroad Company ("P&LE") respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on October 26, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 831 F.2d 1231 and is reprinted in the Appendix hereto at App. A.[1] The unreported Findings of Fact, Conclusions of Law, and Order of the District Court for the

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[1] Each item in Petitioner's Appendix ("App.") is individually lettered, pages within are then numbered with the appropriate letter prefix. *E.g.*, App. A pages are A-1--A-13.

Western District of Pennsylvania entered on October 8, 1987 are reprinted in the Appendix hereto at App. B.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1337. On October 8, 1987, the District Court entered a preliminary strike injunction pursuant to P&LE's counterclaim. On October 26, 1987, the Third Circuit summarily reversed the injunction granted by the District Court. Petitioner did not file a petition for rehearing. Justice Brennan granted P&LE extensions of time for filing this petition for certiorari to and including March 24, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This appeal involves Section 4 of the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. § 104, Section 6 of the Railway Labor Act ("RLA"), 45 U.S.C. § 156, and Sections 10505 and 10901 of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10505, 10901. Each of these statutory provisions is reprinted in the Appendix hereto at App. C. This appeal also involves Interstate Commerce Commission ("ICC") regulations governing ICC authorization of transactions such as the sale at issue in this case. 4 C.F.R. Part 1150, Subpart D. These regulations are reprinted in the Appendix hereto at App. D.[2]

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[2] The ICC has recently amended this subpart of its regulations. *Ex Parte No. 392 (Sub-No. 1) Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901* (served February 29, 1988). *See* 53 Fed. Reg. 5,981 (1988). The regulations reprinted in the appendix do not reflect these amendments, but rather are the regulations that were in effect at the time of the Third Circuit's decision in this case.

STATEMENT OF THE CASE

The Nature of the Action

The P&LE, which operates 182 miles of railroad, has decided to go completely out of the railroad business. After suffering devastating financial losses in recent years, in an effort to avoid certain bankruptcy and abandonment or liquidation of its rail lines, P&LE entered into an agreement to sell its entire rail lines to P&LE Railco, Inc. ("Railco"), which would operate P&LE's present system. Although Railco would not use the same number of employees as P&LE, Railco indicated it would give preferential hiring consideration to P&LE employees.

After P&LE informed its fourteen unions on July 31, 1987 of the proposed sale, they demanded that P&LE bargain with each of them over the decision to sell and its effects on employees, before consummating the sale to Railco. Notwithstanding P&LE's announced decision to go out of business, P&LE's unions served almost identical notices, under Section 6 of the RLA, 45 U.S.C. § 156, proposing that their collective bargaining agreements with P&LE be amended to include life-time wage guarantees for all current P&LE employees, moving allowances, retraining expenses and the option of a lump sum severance payment for employees placed in a worse employment position for any reason. In addition, any employee adversely affected for any reason during his or her lifetime was to receive "penalty pay" equal to three times the lost pay, fringe benefits, and consequential damages suffered by such employee. The Section 6 notices also proposed that any purchaser of P&LE's lines be required to assume P&LE's existing collective bargaining agreements (including the above-proposed lifetime protective benefits and treble damages provisions), to hire P&LE employees, and to recognize P&LE's unions.

P&LE's unions, as apparently instructed by the Railway Labor Executives' Association ("RLEA"),[3] also proposed that P&LE sell its rail lines to its employees, instead of to Railco.

P&LE responded that it had no duty under the RLA to bargain over its decision to go out of business. P&LE also noted that the sale and its effects on employees were subject to the exclusive jurisdiction of the ICC. P&LE offered nonetheless to meet with its unions to discuss the sale.

RLEA brought this action on behalf of P&LE's unions, seeking to enjoin the sale until P&LE completed the lengthy bargaining and mediation procedures of the RLA. Rather than pursue its complaint for injunctive relief, however, on September 15, 1987, RLEA called a general strike of the P&LE. As a result of this strike, P&LE was completely shut down. No connecting carriers would interchange traffic with P&LE for fear they too would be struck.

ICC Authorization of the Sale to Railco

Before Railco could acquire and operate P&LE's lines, it was required to first obtain regulatory authorization from the ICC.

1. General Regulatory Framework

The entry and exit from the railroad business are subject to the exclusive and plenary jurisdiction of the ICC pursuant to the ICA. *See, e.g., Chicago & North Western Transportation Co. v.*

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[3] RLEA is an unincorporated association comprised of the chief executive officers of all the major rail unions, including all fourteen of P&LE's unions.

Kalo Brick & Tile Co., 450 U.S. 311 (1981). Section 10901 of the ICA requires a non-carrier, like Railco[4], who will become a carrier, to obtain a certificate of public convenience and necessity from the ICC. 49 U.S.C. § 10901. Under Section 10901(c)(1)(A)(ii), the ICC has broad discretionary authority to impose conditions protective of the public interest. Courts have long interpreted this conditioning authority to include the power to consider the impact of an ICC-authorized transaction on employees and fashion labor protective benefits. *See, e.g., RLEA v. ICC*, 784 F.2d 959, 965, 969-970 (9th Cir. 1986)[5]

If the ICC determines that regulation is not necessary to carry out national rail transportation policy, it can exempt transactions or classes of transactions from regulatory requirements. 49 U.S.C. § 10505. After five years of experience with individual applications by non-carriers seeking to acquire marginal or failing lines by exemption from the filing requirements of Section 10901, the ICC in *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901*, 1 I.C.C.2d 810 (Dec. 19, 1985) ("*Ex Parte 392*") exempted the class of Section 10901 transactions involving

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[4] Railco is a wholly owned subsidiary of Chicago West Pullman Transportation Corporation. Since it had not previously engaged in the rail business, Railco is treated by the ICC as a non-carrier.

[5] The Third Circuit erroneously believed that Section 10901(e) was the basis for the ICC's discretionary labor protection authority in sales of existing rail lines to non-carriers. 831 F.2d at 1235, n.6, App. A at A-8, n.6. Section 10901(e), however, only applies to the construction of new lines. The Third Circuit also seemed to doubt the existence of the ICC's labor protection authority under Section 10901(c)(1)(A)(ii), although it has been established by this Court since 1942. *ICC v. RLEA*, 315 U.S. 373 (1942) (interpreting predecessor statute to § 10901). 831 F.2d at 1235, n.6, App. A at A-8, n.6. The Third Circuit also erroneously claimed P&LE relied on 49 U.S.C. § 11347. *Id.*

non-carriers from such requirements. The ICC concluded that allowing non-carriers expeditiously to take over marginal lines, without protracted and costly regulatory proceedings, would improve the chances that these lines could be rehabilitated and remain part of the nation's rail system. Under the *Ex Parte 392* procedures, a new operator was authorized to acquire a line of railroad and commence operations seven days after it filed its Notice of Exemption with the ICC. 49 C.F.R. § 1150.32(b).[6]

RLEA participated fully in the ICC rulemaking proceedings that led to *Ex Parte 392*. RLEA there asked the ICC to exercise its discretion and automatically impose labor protective conditions on all transactions subject to the exemption. The ICC, however, concluded that the mechanical imposition of labor protective conditions on Section 10901 transactions was not in the public interest, would encourage the abandonment of rail lines, and would foreclose the revitalization of marginal lines. The ICC was willing to require protections in these transactions upon a showing of "exceptional" circumstances. The ICC also provided in *Ex Parte 392* that: "[a]ny affected party can file a petition to revoke under Section 10505(d) and attempt to show that regulation is necessary to carry out the rail transportation policy." 1 I.C.C.2d at 812. Thus, a union seeking to show circumstances warranting the imposition of labor protection could do so by filing a petition to revoke. Rail labor and other interests appealed the ICC's *Ex*

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6 The ICC recently completed a review of its *Ex Parte 392* procedures and concluded that, although the rules were generally working well and have facilitated a highly beneficial growth in the number of short line and regional railroads, some minor adjustments were needed. *Ex Parte No. 392 (Sub-No. 1) Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901* (served February 29, 1988) at 1-2, 7. *See* 53 Fed. Reg. 5,981. The P&LE transaction would have qualified under the new procedures, except that more than the 7-day notice would have been required by Railco.

Parte 392 procedures, which were affirmed in all respects in *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

2. P&LE's Sale to Railco

On September 19, 1987, Railco made its Notice of Exemption filing with the ICC, pursuant to *Ex Parte 392*. RLEA, on behalf of P&LE's unions, initially did not follow the ICC's petition to revoke procedures, but instead sought to reject Railco's exemption filing and a related exemption filing by Railco's parent, Chicago West Pullman Transportation Company ("CWPT"). RLEA also filed with the ICC a "Complaint for Cease and Desist Order and Other Relief." The thrust of these filings was that the sale of P&LE's rail assets to Railco did not qualify as a Section 10901 transaction, but was subject to ICA Section 11343, which requires the ICC to impose labor protective conditions on all parties to the transaction. Pending ICC action on its filings, RLEA asked the ICC to stay the effectiveness of Railco's and CWPT's exemption filings.

The ICC refused to stay or reject the exemption notices, which became effective September 26, 1987. As explained in its order served September 29, 1987 in Finance Docket Nos. 31121, 31122 and 31126, *P&LE Railco, Inc. -- Exemption Acquisition and Operation -- Lines of The Pittsburgh and Lake Erie R.R. Co. and The Youngstown and Southern Ry. Co.* (reprinted in App. E), the ICC found that RLEA was not likely to succeed on the merits and had failed to show it would suffer irreparable harm in the absence of a stay. Conversely, the ICC found that a stay of the transaction would harm P&LE's rail operations and shippers:

> A stay would likely harm applicant and the shippers it intends to serve. It would delay the

> start of applicant's operations, and would disrupt the planned transition between P&LE's and Railco's service. P&LE's operations are marginal at best. It has lost $60 million in the past few years. It is unclear whether or how long it can continue operations. . . . In addition, the proposed sale of the P&LE to Railco has triggered substantial labor unrest including a strike on the line. A grant of the requested stay would prolong the uncertainty surrounding the fate of the P&LE and also prolong the controversy and attendant disruption in rail service surrounding the sale.

Id. at 4. The ICC therefore found that "[t]he public interest does not support a grant of a stay." *Id.* The ICC specified that RLEA should raise its concerns through a petition to revoke as provided by *Ex Parte 392* and was given 30 days in which to file any petition to revoke. *Id.* at 3.

Immediately thereafter, on October 2, 1987, RLEA filed with the ICC a petition to revoke the exemptions granted to Railco and its parent, CWPT. Rather than ask for the imposition of discretionary labor protections, RLEA sought to block the sale altogether, arguing that P&LE was insolvent and that, as an alternative to the sale to Railco, the ICC should require the purchase of P&LE's rail assets by its employees through an ESOP. RLEA simultaneously asked the ICC to reconsider and stay consummation of the sale while its ESOP proposal was considered. In an order served October 19, 1987, the ICC denied RLEA's petition for reconsideration, but required P&LE to retain its corporate existence until after the ICC completed review of the petition to revoke. Finance Docket Nos. 31121 and 31122, *P&LE Railco, Inc. -- Exemption Acquisition and Operation -- Lines of*

The Pittsburgh and Lake Erie R.R. Co. and The Youngstown and Southern Ry. Co., reprinted at App. F. RLEA's Petition to Revoke and Complaint are still pending before the ICC.

The Strike Injunction

Although all regulatory approvals were in place, the sale could not be consummated, because of RLEA's continuing strike of the P&LE. After the ICC's rulings, P&LE renewed its efforts to enjoin the strike.[7] P&LE argued that the RLA, ICA and NLGA had to be read together; the strike violated the ICA, because the ICC's exclusive jurisdiction replaced any RLA effects bargaining obligation; and the strike violated the RLA, because RLEA was seeking to compel bargaining over non-mandatory subjects and because the status quo within the meaning of the RLA permitted the sale. The District Court issued a preliminary injunction against the strike on October 8, 1987, solely on the ground that it frustrated the ICC's order approving the sale. App. B. The District Court held that the ICC authorization of the sale relieved P&LE of any duty to bargain with its unions over the effects of the sale, and that the NLGA must be accommodated to the ICA. App. B, Conclusions ¶¶ 4-6, 8. The District Court found that the strike curtailed P&LE's operations, caused substantial injury to P&LE, and was intended to, and had in fact, frustrated the planned sale to Railco. App. B, Findings ¶¶ 24-28.

RLEA immediately petitioned the Third Circuit for summary reversal or a stay pending appeal of the District Court's order enjoining the strike. *RLEA v. P&LE*, No. 87-3664. On

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[7] On September 21, 1987, before any ICC filings had been made by Railco, the District Court denied P&LE's application for a restraining order, finding that, although P&LE had no duty to bargain about its decision to go out of business, it must bargain about the effects of the sale, pursuant to Section 6 of the RLA.

October 26, 1987, the Third Circuit granted summary reversal on the narrow ground that the NLGA should not be accommodated to the ICA and the District Court therefore lacked jurisdiction to enjoin the strike. 831 F.2d at 1237, App. A at A-13. The Court expressly declined to consider whether the strike violated the RLA and therefore could be enjoined on that basis. It also refused to review the District Court's holding that the ICC's orders relieved P&LE of any duty to bargain with its unions about the effects of the sale.[8] *Id.* at 1233, 1237, App. A at A-4, A-13.

Once the Third Circuit reversed the District Court's order enjoining RLEA's strike, RLEA indicated that it would immediately renew its strike if any action were taken to consummate a sale.

Decision on Remand

The Third Circuit remanded the case to the District Court for a determination as to whether the strike could be enjoined as a violation of the RLA. While this petition is premised on developments up to the Third Circuit's decision in No. 87-3664, the Court should know that, on remand, the District Court reversed its prior holding that the ICC's jurisdiction over the sale relieved P&LE of any RLA duty to bargain over the effects of the sale on employees. It then enjoined P&LE from selling the railroad until it completed the "long and drawn out" bargaining and mediation procedures of the RLA. The Court held that P&LE could consummate the sale prior to exhaustion of the RLA's bargaining and

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8 P&LE had in fact engaged in permissive effects bargaining with its unions, meeting on September 18, 19, 23 and 25 and October 7 and 9, 1987 (without prejudice to its position that it had no mandatory duty to exhaust the processes of the RLA as to the effects of the sale prior to its consummation) in an effort to reach an agreement addressing the effects of the sale.

mediation procedures, only if the prospective buyer agreed to take all of P&LE's employees, its unions, its collective bargaining agreements, and its RLA bargaining obligations. P&LE took an emergency appeal from that decision, which the Third Circuit agreed to review on an expedited basis. *RLEA v. P&LE*, No. 87-3797. Oral argument was heard on January 8, 1988, with the Third Circuit promising an expedited decision. P&LE obtained the maximum extension of time permitted by 28 U.S.C. § 2101(c) for filing the instant petition for certiorari expecting that the Third Circuit's second decision would issue in time to be joined with this petition, either by P&LE or RLEA depending on its outcome.

As it turned out, the Third Circuit has not yet ruled in No. 87-3797. While, if the Third Circuit had, it may have made sense for any petitions for certiorari from the two decisions (Nos. 87-3664 and 87-3797) to be filed together, this Court can and, P&LE respectfully submits, should grant certiorari of No. 87-3664 on a stand-alone basis. That Third Circuit decision presents a discrete issue which can be reviewed separately from other issues. Moreover, as explained *infra*, the issue of whether the NLGA must be accommodated to the ICA to permit ICC-authorized transactions to be consummated is of immediate significance to the entire railroad industry. Furthermore, P&LE needs some indication, sooner rather than later, given its precarious financial condition, whether, under the law, its only options truly are to liquidate, file for bankruptcy, or submit to the demands to sell to its unions or a purchaser approved by all of its unions.

REASONS FOR GRANTING THE WRIT

A. This Case Raises the Question of Whether One Party to ICC Proceedings -- Rail Labor -- May Use Its Strike Weapon to Frustrate National Transportation Policy

This case generally concerns the ICC's exclusive and plenary authority to regulate the sale of rail lines and to balance and protect the interests of all parties in implementing the national railroad transportation policy. Specifically, this case concerns the ability of organized labor to participate as a party in ICC proceedings and, if dissatisfied with the results, to strike in an effort to compel the result of its choosing and in so doing frustrate the jurisdiction of the ICC. Thus, this appeal presents a vital issue of first impression in this Court -- whether a district court may enjoin a strike whose sole purpose is the frustration of an ICC-approved transaction.

The ICC, which is charged with administering national rail transportation policy, has determined that discretionary labor protective conditions generally should not be imposed in sales of marginal or failing rail lines to new carriers, absent a showing of exceptional circumstances. The ICC has found that, since it adopted this policy, "[n]ew railroad formation quickened, abandonments fell, service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved." Finance Docket No. 31205, *FRVR Corporation -- Exemption Acquisition and Operation -- Certain Lines of Chicago and North Western Transportation Co. -- Petition for Clarification* (served Jan. 29, 1988) at 3 (footnotes omitted) ("*FRVR*").

Organized rail labor initially challenged this policy by participating in ICC proceedings and then taking direct appeals to

the courts of appeals, which upheld the ICC's exercise of its discretionary conditioning authority. *See, e.g., RLEA v. ICC*, 819 F.2d 1172 (D.C. Cir. 1987); *RLEA v. United States*, 791 F.2d 994 (2d Cir. 1986). Rail labor, through the RLEA and individual unions, also participated in the *Ex Parte 392* rulemaking and took an appeal from that order.

When the ICC's application of its authority was being judicially upheld, rail labor, through the RLEA, began petitioning Congress to amend the ICA to require the imposition of labor protections in all transactions subject to Section 10901. *See, e.g.*, Railroad Transportation Policy Act of 1979: *Hearings on S. 1946 before the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 536, 544 (1979) (testimony of J.R. Snyder, Chairman, Legis. Comm., RLEA); H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 250 (1986). Congress has not done so.

Rail labor then tried to attack collaterally the ICC's policy by serving Section 6 notices invoking the RLA's "purposefully long and drawn out"[9] "major dispute" procedures and by bringing actions in the district courts claiming that such ICC-authorized sales violated the RLA's status quo and bargaining requirements. With the exception of the District Court's decision on remand in this action, every court has held that such actions were improper attempts to evade the ICC's jurisdiction. *RLEA v. Staten Island R.R. Corp.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 927 (1987); *Chicago & North Western Transportation Co. v. RLEA*, No. 88-CO444 (N.D. Ill. March 16, 1988); *RLEA v. City of Galveston*, No. G-87-359 (S.D. Tex. Nov. 4, 1987); *Decker v. CSX*

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[9] *Brotherhood of Ry. and Steamship Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 245 (1966).

Transportation, Inc., 672 F. Supp. 674 (W.D.N.Y. 1987); *United Transportation Union v. Burlington Northern R.R. Co.*, No. CV 87-73-H-CCL (D.Mont. Oct. 29, 1987); *Burlington Northern R.R. Co. v. United Transportation Union*, No. 86-5015-CV-SW-O (W.D. Mo. Aug. 29, 1986); *RLEA v. Chicago & Northwestern Transportation Co.*, 124 L.R.R.M. 2715, 2720 (D. Minn. 1986), *appeal pending*, No. 87-5071-MN (8th Cir. arg. Dec. 18, 1987).[10]

In this case RLEA tried out a new strategy; RLEA struck the selling carrier and invoked the NLGA to shield its behavior. The Third Circuit's hasty[11] treatment of the issues led it to an erroneous result. In so doing, the Third Circuit has single-handedly halted the revitalization of the railroad industry by allowing rail labor the ultimate veto -- the right to strike over an ICC order. Since the *P&LE* decision, rail labor has moved quickly to block other transactions authorized under *Ex Parte 392* by threatening to strike or actually striking. *See Chicago & Northwestern Transportation Co. v. RLEA*, No. 88-CO444 (N.D. Ill. March 16, 1988); *Burlington Northern R.R. Co. v. United Transportation Union*, No. 86-5013-CV-SW-8 (W.D. Mo. Nov. 16, 1987), *appeal pending*, No. 87-2581 (8th Cir. arg. Dec. 15, 1987); *RLEA v. City of Galveston*, No. G-87-359 (S.D. Texas Nov. 4, 1987); *Atchison, Topeka & Santa Fe Ry. Co. v. RLEA*, No. 87-C-9847 (N.D. Ill. 1987); *CSX Transportation, Inc.*

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10 Similarly, labor's collateral attacks on transactions where the ICC imposed mandatory labor protections were also rejected. *See RLEA v. Guilford Transportation Industries, Inc.*, 667 F. Supp. 29 (D. Me. 1987), *aff'd per curiam*, No. 87-1774 (1st Cir. 1988); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir.), *cert. denied*, 107 S.Ct. 111 (1986).

11 The District Court's October 8, 1987 order was summarily reversed by opinion issued October 26, 1987.

v. United Transportation Union, No. 87-1391C (W.D.N.Y. arg. March 4, 1988).

The ICC has described the impact of the Third Circuit's decision as follows:

> This decision has had an immediate impact on the formation of small railroads, threatening to halt the revitalization of the marginal railroad sectors -- a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public.

FRVR at 6. The ICC there found that the RLA and NLGA could not be used to frustrate its jurisdiction to authorize rail transactions.[12]

Resolution of the issue by this Court is critical to implementation and administration of the ICA and labor stability in the rail industry. Pursuant to that statute, the ICC has plenary jurisdiction over transportation by rail carrier, including the jurisdiction to approve rail line purchases, sales, consolidations, mergers, abandonments, construction, acquisitions and operations. *See, e.g.*, 49 U.S.C. §§ 10901, 10903, 10904, 11343-45. These transactions will necessarily affect railway employment. For this reason, ICA mandatory policy considerations include the encouragement of fair wages and safe and suitable working conditions in the railroad industry, 49 U.S.C. § 10101a(12), and the ICC has been given comprehensive jurisdiction to address the labor impacts of

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12 The ICC moved to intervene in the *RLEA v. P&LE* proceedings at the appellate level. The Third Circuit granted the ICC leave to file as *amicus curiae* and to present oral argument in favor of P&LE and against RLEA's motion for summary reversal of the injunction. *See* 831 F.2d. at 1235, n.5, App. A at A-7, n.5.

every transaction it approves. *See, e.g.*, 49 U.S.C. §§ 10901(e), 10903(b), 11347. Today, rail labor is unhappy with the ICC's policy in *Ex Parte 392*. Tomorrow, it may be displeased with some other ICC decision or policy. If the Third Circuit is not reversed, rail labor, not the ICC, will become the final arbiter of railroad transportation policy.

B. The Third Circuit's Decision Erroneously Applied and Is Inconsistent with Supreme Court Precedent

In concluding that the District Court had no jurisdiction to grant an injunction in this case, the decision below relied heavily on two Supreme Court decisions applying the NLGA. *See* 831 F.2d at 1236, App. A at A-9--A-10, *citing Order of R.R. Telegraphers v. Chicago & North Western Ry. Co.*, 362 U.S. 330, *reh'g denied*, 362 U.S. 984 (1960) ("*Telegraphers*"); *id.* 1237, App. A at A-12, *citing Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 107 S.Ct. 1841 (1987) ("*BN v. BMWE*"). The Third Circuit's application of those cases was misplaced.

The *Telegraphers* case was cited as rejecting arguments "comparable to those made by P&LE" in this case, in refusing to enjoin a strike in response to a railroad's decision to close certain railroad stations. 831 F.2d at 1236, App. A at A-9. The Third Circuit found the case comparable to this one, because the station closings were sanctioned by state public utilities "pursuant to the Interstate Commerce Act." *Id.* On this point, the Third Circuit is simply wrong. The station closings in *Telegraphers* did not require or receive ICC approval.[13] Moreover, there was no indication that the state agencies had authority to require labor protective conditions. Similarly, *BN v. BMWE* did not in any way involve the exercise of ICC jurisdiction. Thus, neither *Telegraphers* nor *BN v. BMWE* addressed the question of enjoining a strike that is meant to frustrate a specific ICC-approved transaction. The railroad in *Telegraphers* did not argue that the strike would conflict with an ICC approval order, but rather made the broad argument that bargaining with rail labor over the operation of unnecessary and uneconomical stations would run counter to the general Congressional policy, embodied in the ICA, of promoting an efficient national railroad system. *Id.* at 342. The only conflict with the ICA alleged by the railroads in *BN v. BMWE*, was that a strike interfered with the railroads' general duty to operate as a common carrier. The railroads in *Telegraphers* and *BN v. BMWE* therefore sought a sweeping accommodation of NLGA to the ICA. Such a broad accommodation would not have been an accommodation at all, but an obliteration of NLGA's anti-injunction provisions. On the other hand, the Third Circuit goes to the other, equally untenable extreme, holding that NLGA is never accommodated to the ICA, even though there is an obvious clash between the Congressional purposes of the ICA and NLGA in this case.

The Third Circuit's decision was also contrary to long-standing decisions by this Court recognizing that the ICC's authority to address labor disputes arising from its approvals was necessary to avoid strikes and ensure that transactions would be

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[13] At the time, certain states required railroads to seek approval before closing stations, and this Court expressly declined to decide whether a strike over a state-approved station closing could be enjoined, *see Telegraphers* 362 U.S. at 340, n.16.

consummated. For this reason, prior to the first enactment of express statutory authorization for mandatory labor protections (now found in 49 U.S.C. § 11347), the Supreme Court agreed with RLEA that the ICC had the power to impose labor protections on a discretionary basis in mergers and consolidations. *United States v. Lowden*, 308 U.S. 225, 238 (1939). The Supreme Court there expressly acknowledged the interplay between ICC approvals of railroad consolidations and effects upon rail labor, noting that "the steps involved in carrying out the Congressional policy of railroad consolidation in such a manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress . . .," *id.* at 233, and that "[o]n several occasions strikes of railroad employees affected by consolidations of plant facilities have threatened." *Id.* at n.2. Following the same rationale as in *Lowden*, the Supreme Court subsequently held that the ICC's authority under the predecessor statute to Section 10901 included the authority to impose labor protections on a discretionary basis. *ICC v. RLEA*, 315 U.S. 373 (1942).

The Third Circuit's decision is also inconsistent with *Venner v. Michigan Central R.R.*, 271 U.S. 127, 130 (1926), where this Court disapproved collateral attacks on ICC orders. *See also, e.g., Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir.), *cert. denied*, 107 S.Ct. 111 (1986) (citing *Venner*). RLEA's strike is in effect, and intention, a collateral attack on the ICC orders authorizing the immediate sale of P&LE's lines.

C. The Third Circuit's Opinion Conflicts with Decisions in Other Circuits Faced with Similar Issues

While no other Court of Appeals has faced exactly the same issue raised by this case, the Third Circuit opinion is contrary to the rationale of the two circuit courts which have faced similar issues regarding accommodation between the ICA and NLGA. The Third Circuit relied heavily on *Texas & New Orleans R.R. Co. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952, *reh'g denied*, 375 U.S. 871 (1963) ("*Texas & New Orleans*") to support its refusal to sanction an injunction in this case. In *Texas & New Orleans*, the Fifth Circuit overturned an injunction of a strike directed at an ICC-approved transaction. Rather than supporting the Third Circuit's decision in this case, the Fifth Circuit in *Texas & New Orleans* expressly noted that, where there was a clash between the ICA and NLGA, it would in fact require an accommodation of the NLGA to the ICA and uphold a strike injunction: "[I]f it should be determined that the Commission's authority under section 5 (now 49 U.S.C. § 11343) is being frustrated by the application of Norris-LaGuardia to the present suit, we would have to conclude that Norris-LaGuardia was preempted . . . even though section 5 is not labor legislation." *Id.* at 158. Clearly, the ICC's jurisdiction has been frustrated in this case. After notice and opportunity for hearing by RLEA, the ICC determined that the sale of P&LE's lines should go forward expeditiously, without prior resolution of the question of labor protections. The District Court specifically found that "the strike is intended and has the effect of frustrating and avoiding the terms of the sale as approved by the ICC" -- a finding left undisturbed by the Third Circuit. App. B., Findings ¶ 27.

Just last term, this Court denied certiorari on an Eighth Circuit decision granting an injunction against a strike directed at frustrating an ICC-approved transaction. *Missouri Pacific R.R. Co. v. United Transportation Union*, 580 F. Supp. 1490 (E.D. Mo. 1984), *aff'd*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 3209 (1987) ("*Mopac*"). In *Mopac*, as in this case, the union claimed that the rail carrier had to first bargain pursuant to RLA procedures before implementing an ICC-approved transaction. When the carrier asserted that the ICC's jurisdiction controlled, the union threatened to strike. The *Mopac* district court concluded that "it is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings, and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired." 580 F. Supp. 1490, 1505 (E.D. Mo. 1984). The district court found that the NLGA had to be accommodated to the ICC's jurisdiction in these circumstances:

> Congress gave the ICC exclusive and plenary authority to approve certain transactions which are in the public interest. In so doing, Congress specifically intended the ICC to authoritatively resolve labor disputes arising from rail consolidations "in order that economically desirable mergers not be obstructed."

Id.

The Eighth Circuit upheld the injunction issued in *Mopac*, specifically discussing the accommodation necessary between NLGA and the ICA's jurisdictional grant to the ICC and approving the district court's reasoning. 782 F.2d at 111-12. Recognizing that the ICC had the authority to approve the terms of the consol-

dation transaction, including the effects on working conditions, the Eighth Circuit confirmed that allowing a union to strike in an attempt to impose different conditions "would be tantamount to saying that [the union] has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC." *Id.* Thus, the NLGA anti-injuction provisions must be "inapplicable to ICC-resolved, consolidation-related labor disputes." *Id.*

The Third Circuit attempted to distinguish the *Mopac* decision on the basis that the transaction in *Mopac* was subject to 49 U.S.C. § 11341(a), which exempts transactions from the requirements of other laws, and because the ICC imposed labor protective conditions in that case. *See* 831 F.2d at 1237, n.8, App. A at A-12, n.8. However, because the ICC's jurisdiction both to approve a Section 10901 line sale and a merger subject to Section 11341 is exclusive, a strike to block a Section 10901 transaction is equally contrary to the Congressional grant of exclusive and plenary ICC jurisdiction. Moreover, whether the ICC actually imposes labor protections is not the relevant criterion; the relevant inquiry is whether the ICC has authority to impose protections. As the ICC noted in *FRVR*, its "[j]urisdiction is not determined by outcome." Slip op. at 8. In any event, a close reading of the Third Circuit's opinion shows it would find no accommodation of the NLGA even where the ICC imposes mandatory protective conditions. 831 F.2d at 1236, 1237, n.7, App. A at A-12, n.7.

Thus, the Third Circuit's opinion in this action conflicts with the ICC's interpretation of its organic statute and the *Mopac* and *Texas & New Orleans* decisions, where the Eighth and Fifth Circuits, respectively, found that the NLGA must be accommodated to permit the injunction of a strike designed to prevent an ICC-approved transaction.

D. The Third Circuit Erroneously Refused to Accommodate the NLGA with the ICC's Jurisdiction to Resolve Disputes Over Labor Protection

The Third Circuit's refusal to accommodate the NLGA in this case is based upon its erroneous conclusion that the ICA's authority over labor protection was not "adopted as a part of a pattern of labor legislation." *See* 831 F.2d at 1234-36, App. A at A-6, A-9.

As a threshold matter, while *dicta* in this Court's decisions has been read to require accommodation only to other federal labor law, this Court has never so held. P&LE submits that the correct analysis, as in any case of conflict between two federal statutes, is to consider the Congressional purposes of both. *See, e.g., Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). In fact, NLGA has been accommodated to non-labor law in order to effectuate Congressional intent. *See McGuire Shaft & Tunnel Corp. v. Local Union No. 1791*, 475 F.2d 1209, 1214-15 (Em. Ct. App.), *cert. denied*, 412 U.S. 958 (1973) (Economic Stabilization Act).

Even accepting *arguendo* the Third Circuit's restrictive interpretation of NLGA accommodation, the NLGA must still be accommodated in this instance. For example, in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), the Court noted that, in accommodating NLGA to the Labor Management Relations Act, the courts must recognize the Congressional concern in promoting both collective bargaining and "administrative techniques for the peaceful resolution of industrial disputes." 398 U.S. at 251. The ICC's comprehensive labor protection authority is such an "administrative technique" for peaceful resolution of disputes concerning whether and what level of labor protection

benefits should be required in ICC-regulated transactions for affected employees. As previously discussed, the ICA requires the ICC to consider the effects on rail labor. In the first instance, the ICC, after comment by the parties, determines whether to require labor protections and, if so, what level. For example, RLEA had the opportunity to participate in the formulation of *Ex Parte 392*. Although the ICC there decided in *Ex Parte 392* not to automatically impose labor protections on all sales of marginal lines to new operators, the ICC did give rail labor the right in any particular case to show that labor protections were nonetheless warranted, by filing a petition to revoke. 1 I.C.C.2d at 815. If dissatisfied with the level of labor protections imposed by the ICC, rail labor can appeal the ICC's decision to the Court of Appeals. RLEA in fact appealed *Ex Parte 392*, which was affirmed. *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987). If dissatisfied with the ICC's action on a petition for labor protections in a particular case, rail labor also has the right of appeal. *See, e.g., RLEA v. United States*, 811 F.2d 1327 (9th Cir. 1987). If the ICC imposes labor protective conditions, as part of those conditions, it establishes a procedure for the arbitration of any disputes over the interpretation and application of those benefits. *See, e.g., New York Dock Ry. -- Control -- Brooklyn East. Dist. Terminal*, 360 I.C.C. 60, 87 (Appendix III, Art. I, ¶ 11), *aff'd, New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). Again, labor has the right to appeal an arbitration award, first to the ICC and then to the Court of Appeals. *United Transportation Union v. Norfolk & Western Ry. Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 700 (1988).

Similarly, in *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 41, *reh'g denied*, 353 U.S. 948 (1957), relied upon by the Third Circuit, this Court

accomodated NLGA to the RLA's minor dispute procedures, on the basis that those procedures were "not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative." Congress has provided labor a "reasonable alternative" to seek labor protections in ICC-regulated transactions through the above described ICC administrative process with the right of appellate review.

An undercurrent of the Third Circuit's decision, however, is a dissatisfaction with the ICC's *Ex Parte 392* procedures. The Third Circuit noted that the burden was on a protestor to file a petition to revoke and that the ICC had never granted labor protections as a result of a petition to revoke. The Third Circuit also quoted language from *Texas & New Orleans* that the ICA provided rail labor "a small voice of protest." 831 F.2d at 1235, 1237, App. A at A-12. Imagined shortcomings in *Ex Parte 392* procedures are no basis for a court to find a right for unions to strike. Moreover, those procedures have been judicially affirmed. They do not single out rail labor for special treatment; any party, labor or non-labor, seeking modification of an *Ex Parte 392* transaction must do so through a petition to revoke. The fact that relief is after-the-fact also does not render the procedures inadequate. Indeed, under the RLA's minor dispute procedures, which were the subject of *Chicago River*, the carrier is allowed to act first while any grievance is arbitrated. *See, e.g., Empresa Ecuatoriana de Aviacion v. District Lodge No. 100*, 690 F.2d 838, 894, *reh'g denied*, 696 F.2d 1007 (11th Cir. 1982), *cert. dismissed*, 463 U.S. 1250 (1983). Furthermore, if the ICC's denial of a revocation petition in a particular case was improper, the correct remedy, provided by statute, 28 U.S.C. § 2821, is appellate review of the ICC order, not a collateral attack by strike on the ICC's jurisdiction. In addition, RLEA is in no position to complain

about ICC procedures, because it has chosen not even to seek discretionary labor protections in its revocation petition filed in the P&LE ICC proceedings.

The Third Circuit's evident conclusion that rail labor has a "small voice of protest" under the ICA is completely unfounded. In ICC proceedings, RLEA has no lesser, or greater, voice than all the other competing interests subject to the ICC's jurisdiction. Rail labor, principally through the RLEA, has in fact long been instrumental in the amendment of the ICA to expand the ICC's labor protection authorities, which are unprecedented in any other industry.[14] As the ICC noted in *FRVR*, slip op. at 7-8:

> From the 1930's, when the ICC actively became involved in the administration of labor protection, Congress has routinely affirmed and expanded the importance of the Interstate Commerce Act as a part of the complex of laws governing labor relations in the rail industry . . . For more than fifty years the Commission has exercised its authority in this field, frequently at the request and

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14 For example, rail labor had a strong voice in the amendment of Section 5(2)(f) (now 49 U.S.C. § 11347), which was amended at the urging of rail labor to provide an increased level of mandatory labor protective conditions in railroad consolidation proceedings. *See, e.g.*, Railroads - 1975: *Hearings on Legislation Relating to Rail Passenger Service before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce*, 94th Cong., lst Sess. 1104-07 (1975) (testimony of W.G. Mahoney, counsel to RLEA). At labor's urging, the ICA was also amended to make the imposition of labor protective conditions in abandonments mandatory rather than discretionary. Pub. L. No. 94-210, § 802 (1976) (amending 49 U.S.C. § 1a(4), recodified at 49 U.S.C. § 10903(b)(2)). *See* Railroad Revitalization: *Hearings on H.R. 6351 and H.R. 7681 Before the Subcomm. on Transp. and Commerce of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 382 (1975) (testimony of C.J. Chamberlain, Chrmn. RLEA) and at 594 (testimony of C.L. Dennis, Int'l President, Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers & Station Employees).

> with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period.

Similarly, the *Mopac* district court held "because the ICC has jurisdiction over labor disputes in connection with consolidation proceedings, excepting the NLGA in the case at bar does not result in a great departure from established doctrine," citing this Court's *Chicago River* decision as supporting its holding. 580 F. Supp. at 1506.

Finally, accommodation of NLGA to the ICA in this case does no violence to the purpose of NLGA -- protection of employees' rights to use economic pressure to achieve changes in working conditions -- because here P&LE's unions and RLEA were not acting as labor unions, but as another would-be purchaser interested in acquiring P&LE's lines. The NLGA was not designed to allow RLEA to run-off other purchasers through strike activity so it would be the only purchaser left. *Cf. Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945).

Thus, it was error for the Third Circuit to hold that the general NLGA could never be accommodated to the more specific purposes of the ICA. *Cf. Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 42 (1963).

CONCLUSION

For the foregoing reasons, P&LE respectfully requests that the writ be issued as requested herein.

Respectfully submitted,

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Dated: March 24, 1988

APPENDIX

RAILWAY LABOR EXECUTIVES' ASSOCIATION, Appellant,

v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY.

No. 87-3664.

United States Court of Appeals,
Third Circuit.

Argued Oct. 21, 1987.

Decided Oct. 26, 1987.

John O'B. Clarke, Jr. (argued), Highsaw & Mahoney, Washington, D.C., for appellant.

Richard L. Wyatt, Jr. (argued), Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., for appellee.

Clyde J. Hart, Jr. (argued), I.C.C., Washington, D.C., for amicus curiae I.C.C.

Before SLOVITER, BECKER and MANSMANN, Circuit Judges.

OPINION OF THE COURT SUR MOTION FOR SUMMARY REVERSAL

SLOVITER, Circuit Judge.

The district court entered an order on October 8, 1987 enjoining the Railway Labor Executives' Association (RLEA), an association of the executive officers of nineteen railroad unions,

from proceeding with its strike against defendant Pittsburgh & Lake Erie Railroad Company (railroad or P & LE).[1] RLEA appeals from that order contending, *inter alia*, that the district court had no jurisdiction to issue the injunction because section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, has withdrawn jurisdiction from the federal courts to enjoin the strike activity involved in this case. Before us is the motion of RLEA to summarily reverse the district court or in the alternative to stay the injunction pending appeal, on which we have held expedited oral argument.

I.

The following facts are not disputed for purposes of this appeal: P & LE has collective bargaining agreements with various labor organizations whose chief executive officers are members of RLEA. Some of these agreements contain provisions protecting the job security of certain covered employees for their working lives. On July 8, 1987, P & LE entered into an agreement to sell to P & LE Railco, Inc. (Railco), a newly-formed subsidiary of Chicago West Pullman Transportation Corporation, all of P & LE's rail lines and certain operating properties. The jobs of P & LE's approximately 750 employees would be affected by the sale because Railco intends to drop approximately 500 employees and does not intend to comply with or assume any of the existing labor agreements between P & LE and its unions.

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1 The district court's order, although denominated a temporary restraining order, was in substance a preliminary injunction since it was issued after notice and a hearing, was not limited in time, and provided that it shall remain in effect until the court rules on the preliminary injunction for which no hearing has yet been scheduled. Accordingly, we have jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1). *See Professional Plan Examiners v. Lefante*, 750 F.2d 282, 287 (3d Cir. 1984); *San Francisco Real Estate Investors v. Real Estate Investment Trust*, 692 F.2d 814, 816 (1st Cir. 1982).

The unions were notified by P & LE on July 30, 1987 of the pending agreement, and promptly wrote to P & LE noting P & LE's failure to send notice under section 6 of the Railway Labor Act, 45 U.S.C. § 156, and requesting the railroad to bargain over, among other things, the effects of the transaction on its employees.[2] P & LE responded that the transaction is controlled by the Interstate Commerce Commission (ICC) and that section 6 bargaining would usurp the ICC's authority.

On August 19, 1987, RLEA filed a complaint in the United States District Court for the Western District of Pennsylvania against P & LE to enforce the employees' rights under the Railway Labor Act. RLEA sought a declaration that the provisions of the Railway Labor Act were applicable to this transaction, a declaration that the sale could not be consummated until all Railway Labor Act dispute resolution procedures have been exhausted, and an injunction prohibiting P & LE from completing the transaction until that time.

On September 15, 1987, the RLEA commenced a strike against P & LE. P & LE filed an answer to the complaint and a counterclaim seeking to enjoin the strike. The strike was temporarily halted by stipulation for a short period of time but continued thereafter. On September 21, 1987 the district court denied the railroad's request for a temporary restraining order against the strike, holding that such an injunction was precluded by section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, because the railroad had not complied with its obligation under

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2 Under the Railway Labor Act, there can be no unilateral action which would change the terms and conditions of employment while the procedures of the Act are being followed. *See* 18H T. Kheel, Business Organizations: Labor Law § 50.05[1] at 50-24 (1986).

section 6 of the Railway Labor Act, 45 U.S.C. § 156, to give notice, bargain, and maintain the status quo.

On September 19, 1987 the purchasing company, Railco, filed a notice of exemption with the ICC pursuant to 49 C.F.R. § 1150.31. RLEA filed a petition for a stay, a petition for rejection of the notice of exemption, and a complaint seeking an order preventing consummation of the sale. The ICC denied the request for a stay on September 25, 1987. RLEA filed a petition for revocation, which is pending.

Following the ICC's action, P & LE filed a renewed motion for a temporary restraining order, and, after a hearing on October 8, 1987, the district court entered the injunction order which is the subject of this appeal.

In essence, the district court found that the strike substantially curtails the operations of P & LE, that it would cause P & LE's customers and employees to suffer irreparable harm, and that an injunction against the strike was warranted because, by approving the sale of P & LE's assets to Railco, "[t]he ICC, and the statutes and regulations under which it operates, has eliminated the effects of the sale upon P & LE employees as a legitimate consideration in the granting of injunctive relief." Transcript of October 8, 1987 at 77.

The RLEA appeals. Because we conclude that section 4 of the Norris-LaGuardia Act divests the district court of jurisdiction to enter the injunction of October 8, 1987, we will summarily reverse,[3] without considering RLEA's additional argument relying on section 8 of the Norris-LaGuardia Act.

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[3] *See* Internal Operating Procedures of the Third Circuit, Chapter 17.

II.

Under the mandate of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15, as revealed by the words of the statute, the unmistakably clear legislative history,[4] and a long line of Supreme Court cases, district courts lack the power to enjoin employees from exercising their right to strike. *See, e.g., Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, 457 U.S. 702, 708, 102 S.Ct. 2672, 2678, 73 L.Ed.2d 327 (1982); *Milk Wagon Drivers' Union Local No. 753 v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 101-03, 61 S.Ct. 122, 127-28, 85 L.Ed. 63 (1940).

Section 4 of the Act is explicit:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from . . .
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104 (1982).

Notwithstanding this unambiguous language, the Supreme Court has, in certain limited circumstances, determined that there should be an "accommodation" of Section 4's seemingly blanket prohibition on the exercise of the district court's injunctive powers. For example, in *Boys Markets, Inc. v. Retail Clerk's Union Local 770*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199

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[4] *See* H.R.Rep. No. 669, 72d Cong., 1st Sess. 7-8 (1932).

(1970), the Supreme Court held that a federal court is not precluded from enjoining a strike in breach of a collective bargaining agreement that contains a no-strike clause and a mandatory grievance adjustment or arbitration procedure. In light of the strong federal labor policy in favor of labor arbitration, the Court concluded that "the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy." *Id.* at 253, 90 S.Ct. at 1594.

P & LE argues, and the district court found, that the Norris-LaGuardia Act must be accommodated to the Interstate Commerce Act. However, the Norris-LaGuardia Act will be accommodated to another federal statute only if that statute irreconcilably conflicts with the command of the Norris-LaGuardia Act and such an accommodation is necessary to enforce some other overriding and equally clear federal labor policy.

A review of the development of the accommodation cases shows that they have focused on "the need to accommodate two statutes when both were adopted as a part of a pattern of labor legislation." *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co.*, 353 U.S. 30, 42, 77 S.Ct. 635, 641, 1 L.Ed.2d 622 (1957). *See e.g., id.* at 39-42, 77 S.Ct. at 639-41 (plain language of Railway Labor Act requiring that "minor" disputes be submitted to arbitration and legislative history demonstrating Congressional intent that Railway Labor Act grievance procedure be construed as a compulsory substitute for employee's economic self-help require accommodation of Norris-LaGuardia Act's anti-injunction provision); *Brotherhood of Locomotive Engineers v. Louisville and Nashville R.R. Co.*, 373 U.S. 33, 41-42, 83 S.Ct. 1059, 1063-64, 10 L.Ed.2d 172 (1963) (procedure in Railway Labor Act for judicial review of monetary awards by National

Railroad Adjustment Board is integral part of Railway Labor Act grievance procedure which would be violated by a strike); *Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 581-84 & n. 18, 91 S.Ct. 1731, 1737-39 n. 18, 29 L.Ed.2d 187 (1971) (union could be enjoined from striking if it failed to perform its obligations under the Railway Labor Act to "exert every reasonable effort to make and maintain agreements"; the "earlier, general provisions" of the Norris-LaGuardia Act must accommodate the "subsequent, more specific provisions" of the Railway Labor Act when they are in "irreconcilable conflict"). *Cf. Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774-75, 72 S.Ct. 1022, 1025-26, 96 L.Ed. 1283 (1952) (union could be enjoined from racially discriminatory practices which are in violation of Railway Labor Act).

P & LE's argument, joined by the ICC as amicus curiae,[5] that the Interstate Commerce Act is comparable to the Railway Labor Act and that, therefore, the prohibitions of the Norris-LaGuardia Act must be accommodated to the ICC's actions, is unpersuasive. The Interstate Commerce Act, as amended, lists fifteen policies relevant to the regulation of the railroad industry. 49 U.S.C. § 10101a. These include allowing competition and the demand for services to establish reasonable rail transportation rates, minimizing the need for federal regulatory control, and promoting a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the ICC. 49 U.S.C. § 10101a(1), (2), (3). Among the other policies listed are encouragement and promotion of energy conservation, 49 U.S.C. § 10101a(15), and encouragement

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[5] The ICC filed a motion to intervene in this appeal. We granted it leave to file a brief as amicus curiae and to present oral argument.

of "fair wages and safe and suitable working conditions in the railroad industry." 49 U.S.C. § 10101a(12). Nothing in the statutory language suggests that this incidental reference to "fair wages" converts the regulatory scheme over rail transport into a labor law.

Pursuant to the Act, the ICC has been given authority to approve various transactions, including acquisitions, involving rail carriers. When there is a consolidation, merger or acquisition involving existing rail carriers, the ICC must impose certain employee protective provisions. 49 U.S.C. § 11347. However, it is P & LE's position, and the RLEA concedes for purposes of this appeal, that the P & LE sale is not governed by section 11347, but that the transaction falls within the ambit of 49 U.S.C. § 10901 covering the acquisition of a rail carrier's operation by a non-carrier. Section 10901 gives the ICC discretion to require the imposition of employee protective provisions, but does not make imposition of these provisions mandatory.[6] *Compare* 49 U.S.C. § 10901(e) ("Commission *may* require" labor protective provisions) (emphasis added) *with* 49 U.S.C. § 11347 ("Commission *shall* require" such provisions) (emphasis added). In fact, on December 19, 1985, the ICC adopted final rules exempting from regulation almost all acquisitions and operations under 49 U.S.C. § 10901, *Ex parte No. 392 (Sub-No.1)*, 1 I.C.C.2d

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[6] Section 10901(e) provides that "[t]he Commission *may* require any rail carrier proposing both to construct and operate a new railroad line to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected" by a decision to operate a new railroad line (emphasis added). The ICC has suggested that its authority to impose labor protection is not limited by the plain language of this section, but instead extends to any transaction covered by section 10901. *See* Ex Parte No. 392 (Sub-No.1), 1 I.C.C.2d 810, 815 (1985), *review denied sub nom. Illinois Commerce Comm'n v. I.C.C.*, 817 F.2d 145 (D.C.Cir. 1987).

810 (1985), *review denied sub nom., Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C.Cir. 1987), thereby placing upon a protester the burden of filing a petition to revoke the exemption. The ICC stated that such revocation would be granted only in an "extraordinary case" by "an exceptional showing of circumstances" justifying the imposition of labor protection. *Ex Parte No. 392*, 1 I.C.C.2d at 815. No such revocation has been granted since the decision in *Ex Parte No. 392*. *See Central Michigan Ry. -- Acquisition and Operation*, ICC Finance Docket No. 31059, served September 4, 1987 (unpublished) (Dissenting opinion of Vice-Chairman Lamboley).

Neither 49 U.S.C. § 10901 nor 49 U.S.C. § 11347, the other provision relied on by P & LE which makes the ICC's authority "exclusive" with respect to combinations of carriers, contains any language which would suggest Congress intended to override the anti-injunction policy of section 4 of the Norris-LaGuardia Act by the Interstate Commerce Act. The ICC's authority to consider the incidental effect of the transaction on labor and its discretionary authority to require provisions that protect employees do not make the Interstate Commerce Act comparable to the Railway Labor Act, which contains a comprehensive scheme of alternative dispute resolution mechanisms. Neither the ICC nor P & LE have pointed to any language in the legislative history of any of the labor laws or the Interstate Commerce Act which suggests that the strong national policy embodied in the Norris-LaGuardia Act is to be subordinated to the ICC's authority to approve an acquisition of railroad property.

Arguments comparable to those made by P & LE were rejected by the Supreme Court in *Order of R.R. Telegraphers v. Chicago & Northwest Ry. Co.*, 362 U.S. 330, 80 S.Ct. 761, 4

L.Ed.2d 774 (1960). In that case, the Supreme Court held that the absolute prohibition of the Norris-LaGuardia Act against enjoining strikes growing out of any labor dispute deprived the district court of the jurisdiction to enjoin a strike that arose out of a railroad's decision to close several stations. Although the closings had been approved pursuant to the Interstate Commerce Act by the relevant state public utility commissions, and the railroad argued that the strike ran "counter to the congressional policy expressed in the Interstate Commerce Act to foster an efficient national railroad system," *id.* at 342, 80 S.Ct. at 767, the Court held controlling "other legislation . . . like the Railway Labor and Norris-LaGuardia Acts [where] Congress has acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service." *Id.* The majority of the Court rejected the argument of Justice Whittaker, writing for four dissenters, that because Congress had given the ICC and the public utility commissions exclusive jurisdiction over the regulation of station closings, the issue was removed from the field of collective bargaining. The Court also rejected the argument (similar to that made by P & LE before us) that a failure to enjoin the strike could lead to "the financial debilitation" of the railroad. *Id.* at 342, 80 S.Ct. at 767. The Court made clear that such arguments must be addressed to Congress, and not to the courts which are obligated to follow the provisions of the Norris-LaGuardia Act. Significantly, at the time of the *Telegraphers* decision, section 5(2)(f) of the Act, the predecessor of 49 U.S.C. § 11347, provided that the Commission "*require* a fair and equitable arrangement to protect the interests of the railroad employees affected." Act of Sept. 18, 1940, ch. 722, Title I § 7, 54 Stat. 906-07 (repealed 1978); current version at 49 U.S.C. § 11347. (emphasis added).

The *Telegraphers* case was relied on by the Fifth Circuit in its decision holding that a district court had no jurisdiction to enjoin a strike protesting changes in working conditions that resulted from consolidation of certain operations of several railroads, even though the ICC had approved the transaction. *See Texas and New Orleans R.R. Co. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952, 83 S.Ct. 508, 9 L.Ed.2d 500 (1963). Judge Rives, writing for the court, explained, in reasoning we find applicable and persuasive, that the Interstate Commerce Act is not one of those rare statutes to which the Norris-LaGuardia Act must be accommodated. Such an accommodation need only be made "where Congress, through such detailed legislation as the Railway Labor Act and Taft Hartley Act, 29 U.S.C. § 141 *et seq.*, has 'channelled these economic forces [capital and labor] . . . into special processes intended to compromise them' [*Brotherhood of R.R. Trainmen v. Chicago River & Indiana Ry. Co.*] (353 U.S. at 41, 77 S.Ct. at 640) and where these processes would be frustrated without injunctive aid." 307 F.2d at 157 (ellipsis and first brackets in original). The court continued:

> The types of special processes which the courts have enforced with injunctive relief have all involved extensive negotiations and bargaining between the parties, or agreements which result from such bargaining; never processes which allow management to unilaterally choose a change in working conditions and give the union a small voice of protest if the change is unfair or inequitable.

Id. at 158. This language is directly applicable here, since, in the absence of any provision requiring "extensive negotiations and bargaining," RLEA and the employees it represents would be

relegated to "a small voice of protest" without the possibility of either negotiation or economic self-help.[7]

Just last Term the Supreme Court reiterated the Norris-LaGuardia Act policy barring judicial intervention in labor disputes. In *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees*, ___ U.S. ___, 107 S.Ct. 1841, 95 L.Ed.2d 381 (1987), the Court unanimously held that the district court has no jurisdiction to enjoin a strike against a railroad which took place after the parties exhausted the settlement procedure mandated by the Railway Labor Act. The Court declined to narrow the definition of "labor dispute" in the Norris-LaGuardia Act, and reaffirmed that "the legislative history leaves no doubt that Congress intended the Norris-LaGuardia Act to cover the railroads." *Id.* at 1848. It viewed Congress' policy expressed in the Norris-LaGuardia Act as inconsistent with a narrow construction of the statute and left it to Congress to restore federal court power to enjoin strikes and picketing if it so chooses. *Id.* at 1849-50, 1855.[8]

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[7] It is noteworthy that in *Texas and New Orleans R.R.*, the court held the strike could be maintained even though the ICC had issued certain labor protective provisions, 307 F.2d at 154.

[8] The district court relied on *Missouri Pacific R.R. Co. v. United Transp. Union*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3209, 96 L.Ed.2d 696 (1987), where the court held that because of ICC approval of a rail consolidation it could enjoin a strike over the employer's refusal to bargain over the effects of that transaction. That decision is distinguishable.

First, the statutory exemption relied on by the Eighth Circuit (a "carrier, corporation, or person participating in [an] approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction," 49 U.S.C. § 11341(a)) applies only to transactions "approved by or exempted by the Commission *under this subchapter*." (emphasis added). "[T]his subchapter" refers to Subchapter III of Chapter 113 of the Interstate Commerce Act, §§ 11341-51, under which the transaction in *Missouri Pacific* was approved, and not to 49 U.S.C. § 10901, Subchapter I of Chapter 109 of the Act, applicable here.

Second, the Eighth Circuit itself noted that "[a]ffected employees are not left out in the cold, because § 11347 *requires* the ICC to impose employee protective conditions." *Missouri Pacific*, 782 F.2d at 112 (affirming and quoting the district court's opinion, 580 F.Supp. 1490, 1505-06) (emphasis added). However, as noted in the text, there is no such requirement under 49 U.S.C. § 10901(e).

We are, of course, cognizant that a strike will cause economic hardship to the railroad, its shippers, and the community. Such harm is a consequence of the congressional policy leaving resolution of disputes to economic self-help by the parties. We intimate no view as to whether the provisions of the Railway Labor Act are applicable to this dispute so that the district court would be entitled to enjoin the strike while that Act's dispute resolution mechanisms are underway. RLEA's complaint seeking a declaration that the Railway Labor Act is applicable to this dispute is the merits issue before the district court. The only issue before us is the jurisdiction of the district court to issue the order of October 8, 1987.

Because we have concluded that the district court was without jurisdiction to enter an injunction, we will reverse that order and remand this case for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	Civil Action No. 87-1745
PITTSBURGH AND LAKE ERIE RAILROAD COMPANY	)	
Defendant.	)	

FINDINGS OF FACT

1. PLAINTIFF, RAILWAY LABOR EXECUTIVES' ASSOCIATION (RLEA) IS AN UNINCORPORATED ASSOCIATION OF THE CHIEF EXECUTIVE OFFICERS OF 19 LABOR ORGANIZATIONS WHICH ARE "REPRESENTATIVES" AS THAT TERM IS DEFINED IN SECTION 1, SIXTH, OF THE RAILWAY LABOR ACT (RLA), 45 U.S.C. § 151, SIXTH.

2. DEFENDANT, PITTSBURGH AND LAKE ERIE RAILROAD COMPANY (P&LE) IS A RAIL CARRIER WITHIN THE MEANING OF SECTION 1, FIRST, OF THE RLA, 45 U.S.C. § 151, FIRST.

3. P&LE OWNS AND OPERATES A 182 MILE RAIL LINE WHICH RUNS FROM CONNELLSVILLE, PENNSYLVANIA, TO YOUNGSTOWN, OHIO.

4. VARIOUS LABOR ORGANIZATIONS WHOSE CHIEF EXECUTIVE OFFICERS ARE MEMBERS OF RLEA HAVE COLLECTIVE BARGAINING AGREEMENTS WITH P&LE WHICH COVER VARIOUS CRAFTS AND CLASSES OF P&LE EMPLOYEES.

5. ON JULY 8, 1987, P&LE ENTERED INTO A SALES AGREEMENT WITH P&LE RAILCO, INC., A SUBSIDIARY OF CHICAGO WEST PULLMAN TRANSPORTATION CORPORATION; WHEN FINALIZED, SAID AGREEMENT WOULD RESULT IN P&LE RAILCO'S PURCHASE OF ALL OF P&LE RAIL LINES AND CERTAIN OPERATING PROPERTIES.

6. BY LETTER DATED JULY 31, 1987, GORDEN E. NEUENSCHWANDER, PRESIDENT AND CHIEF EXECUTIVE OFFICER OF P&LE, NOTIFIED P&LE EMPLOYEES THAT IT HAD REACHED THE AFORESAID SALES AGREEMENT.

7. P&LE EMPLOYS APPROXIMATELY 750 PEOPLE WHOSE JOBS WILL BE AFFECTED BY THE SALE.

8. P&LE RAILCO DOES NOT INTEND TO OPERATE WITH 750 EMPLOYEES AND DOES NOT INTEND TO COMPLY WITH OR ASSUME ANY OF THE EXISTING LABOR AGREEMENTS BETWEEN P&LE AND ITS UNIONS.

9. CERTAIN OF THE COLLECTIVE BARGAINING AGREEMENTS EXISTING BETWEEN P&LE AND ITS UNIONS PROVIDE FOR JOB SECURITY, I.E., A LIFETIME GUARANTEE OF EMPLOYMENT WITH P&LE.

10. ON OR ABOUT AUGUST 7, 1987, P&LE WAS INFORMED BY A REPRESENTATIVE OF ITS EMPLOYEES' UNIONS THAT P&LE'S PROPOSED SALE OF ITS OPERATING PROPERTIES AND OTHER ASSETS WOULD HAVE AN EFFECT UPON THE WORKING CONDITIONS OF P&LE EMPLOYEES.

11. RLEA TOOK THE POSITION THAT THE SALES TRANSACTION COULD NOT BE EFFECTED WITHOUT COMPLIANCE WITH PROVISIONS OF THE RAILWAY LABOR ACT, 45 U.S.C. § 151, ET SEQ., REGARDING NOTICE, NEGOTIATIONS AND MAINTENANCE OF THE STATUS QUO PENDING COMPLETION OF RAILWAY LABOR ACT PROCEDURES.

12. P&LE RESPONDED THAT IT WAS WILLING TO MEET WITH THE RAIL UNIONS TO DISCUSS THE ANTICIPATED SALE; HOWEVER, P&LE TOOK THE POSITION THAT UNDER THE RAILWAY LABOR ACT IT HAD NO DUTY TO NEGOTIATE CONCERNING THE FACT OR EFFECTS OF THIS SALE.

13. COMMENCING AT APPROXIMATELY 9:00 P.M. (EDT) ON SEPTEMBER 15, 1987, THE RLEA COMMENCED A STRIKE AGAINST THE P&LE.

14. AS A RESULT OF A STIPULATION DATED SEPTEMBER 17, 1987, BETWEEN RLEA AND P&LE, THE STRIKE WAS TEMPORARILY HALTED; THE STIPULATION CEASED TO HAVE EFFECT AS OF 5:00 P.M. (EDT), SEPTEMBER 19, 1987, AND THE RLEA RESUMED THE STRIKE, WHICH HAS CONTINUED TO DATE.

15. THE SALE OF P&LE'S ASSETS TO P&LE RAILCO IS SUBJECT TO THE APPROVAL OF THE INTERSTATE COMMERCE COMMISSION (ICC) PURSUANT TO

THE INTERSTATE COMMERCE ACT, 49 U.S.C. § 10101, ET SEQ.

16. IN APPROVING TRANSACTIONS SUCH AS THE SALE OF P&LE's ASSETS, THE ICC HAS THE AUTHORITY TO IMPOSE LABOR PROTECTIVE PROVISIONS PURSUANT TO 49 U.S.C. § 10901.

17. THE ICC HAS THE AUTHORITY TO EXEMPT CERTAIN TRANSACTIONS CONCERNING RAILROADS FROM THE PROVISIONS OF THE INTERSTATE COMMERCE ACT PURSUANT TO 49 U.S.C. § 10505.

18. TRANSACTIONS WHICH OTHERWISE WOULD BE GOVERNED BY SECTION 10901 OF THE INTERSTATE COMMERCE ACT MAY BE EXEMPTED PURSUANT TO THE PROCEDURES SET FORTH IN 49 C.F.R. §§ 1150.31-39, THE EX PARTE 392 EXEMPTION.

19. PURSUANT TO 49 C.F.R. § 1150.32(B), AN EXEMPTION FROM INTERSTATE COMMERCE ACT REQUIREMENTS BECOMES EFFECTIVE SEVEN DAYS AFTER A NOTICE OF EXEMPTION IS FILED WITH THE ICC.

20. LABOR PROTECTIVE PROVISIONS WILL NOT BE IMPOSED BY THE ICC WHERE A TRANSACTION IS EXEMPTED PURSUANT TO THE EX PARTE 392 PROCEDURES; HOWEVER, THE ICC MAY REVOKE TO THE EXTENT IT SPECIFIES SUCH AN EXEMPTION UNDER SECTION 10505(D) OF THE INTERSTATE COMMERCE ACT IF AN EXCEPTIONAL SHOWING OF CIRCUMSTANCES JUSTIFYING THE IMPOSITION OF LABOR PROTECTION IS MADE BY THE AFFECTED LABOR UNION.

21. ON SEPTEMBER 19, 1987, P&LE RAILCO FILED A NOTICE OF EXEMPTION WITH THE ICC PURSUANT TO 49 C.F.R. § 1150.31.

22. RLEA FILED A PETITION FOR A STAY, A PETITION FOR REJECTION OF THE P&LE RAILCO FILING, AND A COMPLAINT SEEKING AN ORDER PREVENTING CONSUMATION OF THE SALE.

23. IN AN OPINION DATED SEPTEMBER 25, 1987, AND SERVED ON SEPTEMBER 29, 1987, THE ICC DENIED RLEA'S REQUEST FOR A STAY, FINDING THAT RLEA HAD NOT OFFERED SUFFICIENT EVIDENCE TO SHOW IT WAS LIKELY TO PREVAIL ON THE MERITS AND THAT IT HAD FAILED TO SHOW IRREPARABLE HARM ABSENT A STAY.

24. THE STRIKE BY THE RLEA SUBSTANTIALLY CURTAILS THE OPERATIONS OF P&LE.

25. P&LE SUFFERS A LOSS OF APPROXIMATELY $65,250 IN DAILY REVENUES AS A CONSEQUENCE OF THE STRIKE; THESE ARE REVENUES WHICH MAY BE RECOUPED IN PART.

26. SOME OF P&LE'S CUSTOMERS HAVE ACCESS TO NO OTHER RAILROAD BUT P&LE; OTHER CUSTOMERS HAVE ACCESS TO P&LE AND OTHER RAILROADS BUT SUCH OTHER RAILROADS HAVE REFUSED TO SERVICE P&LE CUSTOMERS.

27. THE STRIKE IS INTENDED AND HAS THE EFFECT OF FRUSTRATING AND AVOIDING THE TERMS OF THE SALE AS APPROVED BY THE ICC.

28. THE STRIKE AGAINST P&LE HAS CAUSED AND WILL CONTINUE TO CAUSE SUBSTANTIAL AND IRREPARABLE INJURY TO P&LE UNLESS ENJOINED, IN THAT IT HAS AND WILL CAUSE THE LOSS OF SUBSTANTIAL REVENUES TO P&LE, WHICH MAY NOT BE RECOUPED, AND MAY CAUSE THE PERMANENT LOSS OF CUSTOMERS.

29. THE GRANT OF INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST IN THAT THE STRIKE HAS AND WILL CAUSE SEVERE ECONOMIC CONSEQUENCES TO P&LE'S CUSTOMERS AND THEIR EMPLOYEES.

30. THE ICC, AND THE STATUTES AND REGULATIONS UNDER WHICH IT OPERATES, BY ITS DECISION OF SEPTEMBER 25, 1987, HAS ELIMINATED THE EFFECTS OF THE SALE UPON P&LE EMPLOYEES AS A LEGITIMATE CONSIDERATION IN THE GRANTING OF INJUNCTIVE RELIEF.

CONCLUSIONS OF LAW

1. THIS COURT HAS JURISDICTION OVER THIS ACTION PURSUANT TO THE RAILWAY LABOR ACT, 45 U.S.C. § 151, ET SEQ., AND 28 U.S.C. § 1331.

2. P&LE HAS NO ADEQUATE REMEDY AT LAW.

3. THE DISPUTE BETWEEN THE PARTIES TO THIS ACTION IS A MAJOR DISPUTE, I.E., ONE INVOLVING A MAJOR CHANGE, AFFECTING JOBS, IN AN EXISTING COLLECTIVE BARGAINING AGREEMENT. RAILROAD TELEGRAPHERS V. CHICAGO AND NORTHWESTERN RAILWAY COMPANY, 362 U.S. 330 (1960).

4. P&LE HAS DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS COUNTERCLAIM IN THAT THE STRIKE AT ISSUE IS IN VIOLATION OF THE INTERSTATE COMMERCE ACT, 49 U.S.C. § 10101, ET SEQ.

5. THE STRIKE IS ILLEGAL IN THAT IT SEEKS TO FORCE P&LE TO PROVIDE LABOR PROTECTIVE PROVISIONS IN CONNECTON WITH THE SALE OF ITS ASSETS, THEREBY NEGATING, IN EFFECT, THE ICC'S DETERMINATION THAT SUCH PROVISIONS SHOULD NOT BE REQUIRED IN TRANSACTIONS, SUCH AS THE INSTANT SALE, WHICH HAVE BEEN EXEMPTED FROM INTERSTATE COMMERCE ACT REQUIREMENTS PURSUANT TO 49 U.S.C. § 10505, AND 49 C.F.R. § 1150.31, AND THE ICC'S EX PARTE 392 DECISION.

6. THE ICC'S FAILURE TO STAY THE EXEMPTION RELIEVES P&LE OF THE DUTY TO NEGOTIATE WITH ITS UNIONS CONCERNING THE EFFECT OF THE SALE ON P&LE EMPLOYEES. MISSOURI PACIFIC RAILROAD COMPANY V. UNITED TRANSPORTATION UNION, 782 F.2D 107 (8TH CIR. 1986), CERT. DENIED, 107 S.CT. 3209 (1987).

7. BECAUSE THE INTERSTATE COMMERCE ACT EXEMPTION HAS RELIEVED P&LE OF THE DUTY TO BARGAIN WITH ITS EMPLOYEES, P&LE IS NOT IN VIOLATION OF SECTION 8 OF THE NORRIS-LAGUARDIA ACT, 29 U.S.C. § 108.

8. SECTION 4 OF THE NORRIS-LAGUARDIA ACT, 29 U.S.C. § 104, DOES NOT BAR INJUNCTIVE RELIEF; THE PROVISIONS OF THE NORRIS-LAGUARDIA ACT CANNOT

BE READ ALONE IN MATTERS DEALING WITH RAILWAY DISPUTES, BUT RATHER MUST BE ACCOMMODATED TO THE PURPOSES OF OTHER FEDERAL STATUTES. BROTHERHOOD OF RAILROAD TRAINMEN V. CHICAGO RIVER AND INDIANA RAILROAD COMPANY, 353 U.S. 30 (1957).

9. THE ANTI-INJUNCTION PROVISIONS OF THE NORRIS-LAGUARDIA ACT ARE DISPLACED BY THE JURISDICTION OF THE ICC IN THE INTERSTATE COMMERCE ACT. MISSOURI PACIFIC RAILROAD COMPANY V. UNITED TRANSPORTATION UNION, 782 F.2D 107 (8TH CIR. 1986), CERT. DENIED, 107 S.CT. 3209 (1987).

/S/ Alan M. Bloch
United States District Judge

Date: 10/8/87

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, Plaintiff,	)	
vs.	)	Civil Action No. 87-1745
PITTSBURGH AND LAKE ERIE RAILROAD COMPANY Defendant.	)	

TEMPORARY RESTRAINING ORDER

AND NOW, this 8th day of October, 1987, IT IS HEREBY ORDERED that:

1. Plaintiff and each of its members, their lodges, divisions, locals, officers, agents, employees, and representatives, and all persons acting in concert or participating with them, be and hereby are restrained from authorizing, calling, causing, inducing, conducting, permitting, continuing in, or engaging in any picketing, patrolling, self-help or disruptive behavior in any manner interfering with P&LE's operations.

2. Plaintiff and each of its members shall issue such notices and instructions and take all other necessary steps, including intra-union discipline, to carry into effect the intent of this Temporary Restraining Order.

3. The Court retains jurisdiction to issue all other and further relief in law and equity as it deems just and proper.

IT IS FURTHER ORDERED that this Temporary Restraining Order, the same having been issued after notice and a hearing, shall remain in effect until this Court rules on the preliminary injunction sought by defendant.

/S/ Alan M. Bloch
United States District Judge

cc: Counsel of record.

Entered at 1:35 p.m. this
8th day of October, 1987, at
Pittsburgh, Pennsylvania.

Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*

Section 4, 29 U.S.C. § 104

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

Railway Labor Act, 45 U.S.C. § 151, *et seq.*

Section 6, 45 U.S.C. § 156

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proferred its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

May 20, 1926, c. 347 § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.

Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*

Section 10505, 49 U.S.C. § 10505

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle--

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to

provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub.L. 96-488, Title II, § 213, Oct. 14, 1980, 94 Stat. 1912.

Section 10901, 49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may --

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall--

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c)(1) If the Commission--

(A) finds public convenience and necessity, it may --

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

(d)(1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line,

(B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1402; Pub.L. 96-448, Title II, § 221, Oct. 14, 1980, 94 Stat. 1928.

Interstate Commerce Commission Regulations, Part 1150 - Certificate to Construct, Acquire, or Operate Railroad Lines,

Subpart D -- Exempt Transactions, 49 C.F.R. 1150

Subpart D -- Exempt Transactions

SOURCE: 51 FR 2504, Jan. 17, 1986, unless otherwise noted.

§ 1150.31 Scope of exemption

(a) Except as indicated below, this exemption applies to all acquisitions and operations under section 10901 (*See* 1150.1, *supra*). This exemption also includes:

(1) Acquisition by a noncarrier of rail property that would be operated by a third party;

(2) Operation by a new carrier of rail property acquired by a third party;

(3) A change in operators on the line; and

(4) Acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation. This exemption does not apply when a class I railroad abandons a line and another class I railroad then acquires the line in a proposal that would result in a major market extension as defined at § 1180.3(c).

(b) Other exemptions that may be relevant to a proposal under this subpart are the exemption for control at § 1180.2(d)(1) and (2), and the from securities regulation at 49 CFR Part 1175.

§ 1150.32 Procedures and relevant dates.

(a) To qualify for this exemption, applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in § 1150.34, for publication in the FEDERAL REGISTER.

(b) The exemption will be effective 7 days after the notice is filed. The Commission, through the Director of the Office of Proceedings, will publish a notice in the FEDERAL REGISTER within 30 days of the filing. A change in operators would follow the provisions at § 1150.34, and notice must be given to shippers.

(c) If the notice contains false or misleading information, the exemption is void *ab initio*. A petition to revoke under 49 U.S.C. 10505(d) does not automatically stay the exemption.

§ 1150.33 Information to be contained in notice.

(a) The full name and address of the applicant;

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

(d) The operator of the property;

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property,

(2) The proposed time schedule for consummation of the transaction,

(3) The mile-posts of the subject property, including any branch lines, and

(4) The total route miles being acquired;

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

(g) A certificate that applicant has complied with the notice requirements of § 1105.11.

[51 FR 2504, Jan. 17, 1986, as amended at 51 FR 25207, July 11, 1986]

§ 1150.34 Caption summary.

The caption summary must be in the following form. The information symbolized by numbers is identified in the key below:

INTERSTATE COMMERCE COMMISSION

Notice of Exemption

Finance Docket No.

(1) -- Exemption (2)-(3)

(1) Has filed a notice of exemption to (2)(3)'s line between (4). Comments must be filed with the Commission and served on (5).(6).
Key to symbols:

(1) Name of entity acquiring or operating the line, or both.

(2) The type of transaction, *e.g.*, to acquire, operate, or both.

(3) The transferor.

(4) Describe the line.

(5) Petitioners representative, address, and telephone number.

(6) Cross reference to other class exemptions being used.

The notice is filed under § 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31121

P&LE RAILCO INC.--EXEMPTION ACQUISITION AND OPERATION--LINES OF THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY AND THE YOUNGSTOWN AND SOUTHERN RAILWAY COMPANY

Finance Docket No. 31122

CHICAGO WEST PULLMAN CORPORATION--CONTINUANCE IN CONTROL EXEMPTION--P&LE RAILCO, INC. AND--CONTROL EXEMPTION--THE PITTSBURGH, CHARTIERS AND YOUGHIOGHENY RAILWAY COMPANY

Finance Docket No. 31126

RAILWAY LABOR EXECUTIVES' ASSOCIATION

v.

PITTSBURGH & LAKE ERIE RAILROAD CO., ET AL.

Decided: September 25, 1987

On September 19, 1987, P&LE Railco, Inc. (Railco), a noncarrier, filed a notice of exemption under 49 CFR 1150.31 to acquire and operate certain properties of The Pittsburgh and Lake Erie Railroad Company (P&LE) and its wholly-owned subsidiary, The Youngstown and Southern Railway Company (Y&S) (Finance Docket No. 31121). The properties consist of the main line and all branch lines of P&LE and Y&S, which comprise a single system of approximately 182 miles extending generally from

Youngstown, OH, to Brownsville and Connellsville, PA. Also under the agreement, Railco will acquire 230 miles of incidental trackage rights over Conrail lines. Under 49 CFR 1150.32(b), the exemption notice is scheduled to become effective 7 days after it is filed (September 26, 1987).

Railco, which was formed for the purpose of acquiring and operating the lines of P&LE and Y&S, is a wholly-owned subsidiary of noncarrier Chicago West Pullman Transportation Corporation (CWPT), which in turn, is a wholly-owned subsidiary of noncarrier Chicago West Pullman Corporation (CWP). PC&Y Holdings (Holdings) is another noncarrier subsidiary of CWPT. Holdings was formed to acquire the shares of The Pittsburgh, Chartiers and Youghiogheny Railway (PC&Y) that are being purchased from P&LE by Railco.[1]

Concurrently with the filing of Railco's notice, CWP filed a notice of exemption under 49 CFR 1180.2(d)(2) to continue control, through CWPT, of Railco and to control, through CWPT and Holdings, a 50 percent ownership interest in PC&Y (Finance Docket No. 31122).

On September 24, 1987 Howard M. Metzenbaum, United States Senator from Ohio and Richard R. Celeste, Governor of Ohio, filed letter-petitions requesting a stay of the effectiveness of the exemption of this transaction. Also on September 24, 1987, the Commission received a letter from Harry Meshel, Minority Leader of the Ohio Senate, asking the Commission to delay the sale of the P&LE to Chicago West Pullman Corporation. By mailgram received September 24, 1987, U.S. Representative from

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[1] Upon consummation of the purchase by Railco of the assets of P&LE and Y&S, Railco will direct P&LE to deliver to Holdings 50 percent of the stock of PC&Y.

Pennsylvania William J. Coyne asked the Commission to delay its action on the Chicago West Pullman notice of exemption. Ohio State Representative Robert F. Hagan seeks similar relief. Senator Meshel, Representative Coyne, and Representative Hagan wish their correspondence to be treated as stay petitions. We will therefore treat the letters and mailgram as requests for stays.

The Railway Labor Executives' Association (RLEA) filed a complaint,[2] a petition for rejection, and a petition for stay. The complaint (Finance Docket No. 31126) alleges that the provisions of 49 U.S.C. 11343, et seq. rather than 10901, are applicable to the transaction and requests a cease and desist order be issued to prevent consummation. Subsequently, RLEA also filed an emergency petition in Finance Docket No. 31126 for "temporary cease and desist order" in which it addresses issues substantially similar to those raised in its complaint.

The request to reject is based on RLEA's belief that the notice of exemption in Finance Docket No. 31121 is incomplete without an environmental report (see 49 CFR 1105.7). Petitioners also allege that the existence of historical structures on the line requires that various reviews be completed pursuant to the National Historic Preservation Act prior to effectiveness of the exemption. On this basis, it seeks a stay of the exemption.

Railco replied to the requests of Senator Metzenbaum and Congressman Coyne.

The requests for stay will be denied. Petitioners have not demonstrated justification for a stay in accordance with the four criteria set forth in Washington Metropolitan Area Transit

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[2] The RLEA complaint is addressed here only to the extent it requests entry of a cease and desist order.

Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) viz.,

(1) that there is a strong likelihood that the movant will prevail on the merits;

(2) that the movant will suffer irreparable harm in the absence of a stay;

(3) that other interested parties will not be substantially harmed; and

(4) that the public interest supports the granting of the stay.

In Washington Metropolitan Area Transit Comm., the District of Columbia Circuit held that, in a case in which the other three factors strongly favor interim relief, a stay may be granted if the movant has made a substantial case on the merits. Petitioners have not demonstrated justification for a stay under any of the above criteria. Most importantly, petitioners have not shown that they will likely prevail on the merits or that they will suffer irreparable harm absent a stay.

1. The petitioners have not demonstrated a likelihood that they will prevail on the merits. The size of a transaction, standing alone, is not dispositive of the applicability of the exemption. See, e.g., Finance Docket No. 31071, Red River Valley & Western Railroad Company--Acquisition and Operation Exemption--Certain Lines of Burlington Northern Railroad Company, served July 22, 1987, involving a notice of exemption under 49 C.F.R. 1150.31 for 656 miles of rail line. Nothing in our rules or decision adopting them limits the use of the exemption to transfers of small line segments with little or no public impact. Moreover, while there will be an impact on P&LE and Y&S employees, we have found that the issue of labor protection may be resolved after an

exemption becomes effective. The class exemption rules provide for employee protection upon a showing of particular need. Such showing has not been made so as to justify a stay here.

The issue of review under section 11343 (as opposed to 10901) can also be addressed following effectiveness of the notice (see Finance Docket No. 30237, Maryland Midland Railway, Inc. - Exemption from 49 U.S.C. 11343 and 11301 (not printed), served January 6, 1987 and August 10, 1987, where we reversed a prior decision finding section 10901 applicable). Furthermore, RLEA has not offered sufficient evidence to show it is likely to prevail on the merits of this issue so as to warrant a stay or cease and desist order. Many factors not addressed by RLEA affect whether a transaction such as this will be considered subject to sections 11343 or 10901. See Finance Docket No. 30911, Chicago, Missouri & Western Railway Co. - Exemption Acquisition and Operation - Illinois Central Gulf Railroad Co. (not printed), served May 12, 1987, in which we found that a sale to a newly formed carrier controlled by a company that controlled another rail carrier was subject to section 10901. See also Railway Labor Executives' Association v. I.C.C. and U.S., 819 F.2d 1173 (D.C. Cir. 1987) in which a similar structuring and sale under section 10901 rather than 11343 was affirmed. If, in fact, P&LE's interest in the Monongahela Railway Co. is being transferred, the section 11343/10901 labor issues still can be addressed after the fact. Moreover, the fact that this 1/3 interest may be transferred is not required to be included either in the notice under Ex Parte No. 392 (Sub-No. 1), or the control exemption notice (F.D. No. 31122). Our rules do not specifically require this detailed information, and a 1/3 interest may not, in the circumstances, constitute control.

2. Petitioners have failed to show irreparable harm absent a stay. Under section 10505(d), a petition to revoke can be filed at

any time, even after consummation. Indeed in Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 310 (1986) (Class Exemption). We expressly provided that:

> [A]ny transaction could be reversed in whole or in part, and we specifically reserve the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accordance with the provisions of the rail transportation policy.

Petitioners have failed to show that employees could not be made whole in the unlikely event that the Commission imposes labor protection in a future exemption revocation proceeding. See discussion supra. Consequently, any alleged harm to the affected area based on an adverse impact on employees is speculative.[3] While revocation is normally an adequate remedy, here because this transaction involves the sale of P&LE's entire line, we will require P&LE as a condition to effecting this transaction, to maintain its corporate existence until the Commission has had an opportunity to consider a petition for revocation filed within 30 days. While it is alleged that the transfer may threaten essential services, petitions have failed to offer any other specific evidence of irreparable harm in this regard.

Finally, the environmental and historic structures issues do not support a finding of irreparable harm. In the context of this

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[3] RLEA also alleges that stay is justified based on the pendency of AB-160 (Sub-No. 5X), Montour Railroad Company--Abandonment Exemption--In Allegheny and Washington Counties, PA. We disagree. An abandonment was granted there, and the only pending issue is whether labor protective conditions should be imposed. After the fact relief (if found justified) will fully protect railroad employees. This was not a matter relevant to this sale transaction that warranted notice in P&LE's filing.

transaction (i.e., a change in ownership) the quality of the environment could be affected only by a decline in the labor force such that, for example, maintenance-of-way practices would be virtually eliminated. Such a circumstance is not contemplated here.[4] As to historic structures and the section 106 process, the Commission will consult with the appropriate officials in the affected states to ensure compliance and a condition will be imposed to ensure the historic integrity of sites and structures 50 years old or older. A stay is therefore not necessary.

3. Other affected parties would be substantially harmed by the grant of a stay. A stay would likely harm applicant and the shippers it intends to serve. It would delay the start of applicant's operations, and would disrupt the planned transition between P&LE's and Railco's service. P&LE operations are marginal at best. It has lost $60 million in the past few years. It is unclear whether or how long it can continue operations. It states that for some time it has been in default on $135 million in debt and, pursuant to a restructuring agreement, has been liquidating assets. Its creditors are increasingly unwilling to continue this procedure. If it is forced shortly to cease operations, the adverse economic impact on shippers, employees, and communities on the lines will be substantial. In addition, the proposed sale of the P&LE to Railco has triggered substantial labor unrest including a strike on the line. A grant of the requested stay would prolong the uncertainty surrounding the fate of the P&LE and also prolong the

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[4] The petition to reject will be denied. Our rules are not entirely clear. Applicants could have read 49 CFR 1105.6(c)(2) as applicable. In any event, 49 CFR 1105.7(f) allows waiver of rules on our own motion. We find the notice adequate and see no nexus between the changes contemplated here and adverse impact on the environment.

controversy and attendant disruption in rail service surrounding the sale.

4. The public interest does not support a grant of a stay. Rather, it is in the public interest to allow the class exemption to take effect, and to address the issues raised by petitioners via the revocation process.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petitions for stay, entry of a cease and desist order, and rejection are denied.

2. Applicants are prohibited from taking any action to jeopardize the historic integrity of sites and structures on the line that are 50 years old or older. This condition will remain in effect pending completion of the section 106 review process.

3. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley dissented. His separate expression will be served separately. Commissioner Simmons dissented with a separate expression.

Noreta R. McGee
Secretary

(SEAL)

COMMISSIONER SIMMONS, dissenting:

In fairness I would have granted a stay request of two weeks in order to permit the affected persons, namely employees, to continue negotiations with the seller and vendor. Apparently, Railco is willing to discuss compensation terms for displaced employees and benefits and wages with the unions. I do note here this unique opportunity where a purchaser is willing to provide some type of guarantees to affected employees.

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31121

P&LE RAILCO INC.--EXEMPTION ACQUISITION AND OPERATION--LINES OF THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY AND THE YOUNGSTOWN AND SOUTHERN RAILWAY COMPANY

Finance Docket No. 31122

CHICAGO WEST PULLMAN CORPORATION--CONTINUANCE IN CONTROL EXEMPTION--P&LE RAILCO, INC. AND--CONTROL EXEMPTION--THE PITTSBURGH, CHARTIERS AND YOUGHIOGHENY RAILWAY COMPANY

Decided: October 13, 1987

On October 2, 1987, the Railway Labor Executives' Association (RLEA) filed a petition for reconsideration of a decision served September 29, 1987, denying the requests for stay of the effectiveness of the exemptions in this proceeding. RLEA asks that a stay be imposed at this time.

The petition will be rejected. Under the Commission's class exemption procedures for the acquisition and operation of rail lines under 49 U.S.C. 10901, a petition for reconsideration of a stay denial does not lie. Title 49 CFR 1150.32(b) provides that an exemption under Subpart D will be effective 7 days after the notice is filed. Moreover, we have already issued a decision declining to stay this transaction. The appropriate remedy at this

stage of the proceeding is a petition for revocation of the exemptions.[1]

RLEA's petition has raised certain matters which do require clarification. The Commission stated in the body of the September 29th decision that ". . . we will require P&LE as a condition to effecting this transaction, to maintain its corporate existence until the Commission has had an opportunity to consider a petition for revocation filed within 30 days." As RLEA points out, the Commission failed to include this requirement in the ordering paragraph. That oversight will be rectified in this decision. Also, RLEA questions the scope of the historic preservation condition which the Commission imposed upon applicants pending completion of the review process mandated by section 106 of the National Historic Preservation Act. RLEA interprets the condition as preventing only the destruction of the historic structures and not deterioration through reduced maintenance. The Commission's order prohibits applicant from taking any action to jeopardize the historic integrity of the sites and structures on the line that are 50 years old or older. (Emphasis added.) This language obviously encompasses any decrease in maintenance envisioned by RLEA.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petition for reconsideration is rejected.

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1 RLEA also filed a petition for revocation of the exemptions. A decision addressing the petitions for revocation will be issued separately.

2. The Pittsburgh and Lake Erie Railroad is required, as a condition to effecting this transaction, to maintain its corporate existence until the Commission has had an opportunity to consider petitions for revocation filed on or before October 29, 1987.

3. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Simmons dissented in part with a separate expression. Vice Chairman Lamboley dissent with a separate expression.

Noreta R. McGee
Secretary

(SEAL)

COMMISSIONER SIMMONS, dissenting in part:

I continue to believe that a stay of limited duration was warranted in this proceeding. See my separate expression to the decision of September 29.

VICE CHAIRMAN LAMBOLEY, dissenting:

I would grant the petition for reconsideration and impose a stay as discussed in my dissenting separate expression to the decision served September 29, 1987.